Date: July 24, 1996
Case No.: 94-INA-00587

In the Matter of:

DR. JERARD HURWITZ,
Employer

On Behalf of:

MIRTA FONTANA,
Alien

Appearance: Rhoda K. Dryer, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 18, 1992, Dr. Jerard Hurwitz ("Employer") filed an application for labor certification to enable Mirta Fontana ("Alien") to fill the position of Cook (live-in) (AF 22-23). The job duties for the position are, "[p]lan menus, food marketing, cook and serve for employer and guests, clean kitchen and dining areas." The requirement for the position is two years of experience in the job offered or the related occupation of houseworker with cooking duties. Other Special Requirements are no smoking on the Employer's premises and references are required.

The Employer originally filed an application for this Alien on January 28, 1991, to fill the position of live-out housekeeper (AF 6). The Employer submitted a letter dated December 8, 1992 (AF 17-18), stating that he was not proceeding with this application for labor certification, even though an employment-based immigrant visa petition was approved. The Employer referred to his changed circumstances; *i.e.*, he is now a widower, is now living in an apartment in New York City, and he has stomach problems, as the reason for the new application.

The CO issued a Notice of Findings on May 17, 1994 (AF 54-57), proposing to deny certification on the grounds that it is not clear that a permanent, full-time job actually exists as defined by the regulations at 20 C.F.R. § 656.50. The CO also proposed denial on the grounds that the Employer's requirement of two years of experience in the related occupation as a houseworker, general, exceeds the SVP requirement at 20 C.F.R. § 656.21(b)(2) and is, therefore, excessive and restrictive. Accordingly, the Employer was notified that it had until June 21, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 15, 1994 (AF 58-81), the Employer contended that a permanent, full-time job actually exists for the position of cook, and that, "[t]he absence of a full-time cook would undermine and handicap my ability to carry on the functions of my

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

household." The Employer further stated that he attached a "Rider" to his application for labor certification, setting forth the business necessity for the live-in requirement. With regard to the second issue raised in the NOF, the Employer contended that, "the alternate related experience requirement as housekeeper with cooking duties is experience that reasonably qualifies a worker for the job and expands the job opportunity to a larger pool of workers." The Employer also ascertained that since the specific job offered is for a cook, applying the SVP for a housekeeper appears to be incorrect, the appropriate SVP is that applicable to the job for which certification is sought. In the alternative, the Employer contended that the amount of experience required in the related occupation arises from business necessity.

The CO issued the Final Determination on June 27, 1994 (AF 82-84), denying certification because the requirement for two years of experience in the related occupation as a houseworker with cooking responsibilities remains excessive and restrictive. The CO found that the Employer has failed to document business necessity for the requirement of two years of experience in the related occupation pursuant to the regulations at 20 C.F.R. § 656.21(b)(2).

On July 28, 1994, the Employer requested review of the Denial of Labor Certification (AF 85-86). On August 25, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a Brief on September 29, 1994, and on October 11, 1994, submitted a request that a copy of the Decision and Order in *Henry L. Malloy (Mr. & Mrs.)*, 93-INA-355 (Oct. 5, 1994), be included as an addendum to the appeal brief.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

In this case, the Employer requires two years of experience in the position of live-in Cook, which is within the SVP in the description of that position in the *Dictionary of Occupational Titles* at 305.281-010. The Employer also lists an alternative requirement of two years of experience as a live-in Housekeeper with cooking duties (AF 23). The SVP of the position of Housekeeper only requires three months of experience according to the DOT at 301.474-010. The CO has denied certification solely on the grounds that the alternative experience requirement is unduly restrictive (AF 82-83).

In *Best Luggage, Inc.*, 88-INA-553 (Nov. 1, 1989), an employer required two years of experience as a luggage wholesaler, or in the alternative two years of experience as a partner in a luggage wholesale business. The CO denied certification, finding that the alternative experience requirement was excessive, and thus, unduly restrictive. The Panel reversed, finding "[a]pplicants were not required to possess both experience as a wholesaler and as a partner. Because applicants were not required to have experience as a partner, this alternative experience requirement cannot be considered unduly restrictive. This alternative requirement is both related to and appropriate for the job opportunity . . . ." In a more recent case, a BALCA Panel determined that under *Best Luggage*, the CO's denial of certification for the position of Cook, based solely on the alternative requirement of two years of experience as a Housekeeper with general cooking duties, was improper. See *Mr. & Mrs. Henry L. Malloy,* 93-INA-355 (Oct. 5, 1994).

Based upon the precedent of *Best Luggage* and *Malloy*, we find that the CO's denial of labor certification based solely upon an excessive alternative experience requirement is improper. We note that in this case, as in *Malloy* and *Best Luggage*, the Employer's use of alternative requirements does not chill, but expands the universe of potentially qualified U.S. applicants.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**.

Entered this the August 20, 2002 for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400

***Washington, D.C. 20001-8002*.**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.